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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re ALFRED RICO,
On Habeas Corpus.

3 Crim. C063865

(Super.Ct.No.
09F01623)

Matthew Cate, Secretary of the Department of Corrections and Rehabilitation, appeals from a superior court order granting respondent Alfred Rico's petition for writ of habeas corpus following the Governor's reversal of the decision of the Board of Parole Hearings (Board) to grant parole. Rico was imprisoned in 1992 for a term of 19 years to life upon his conviction for second degree murder with a firearm.

Appellant claims the Governor's decision was supported by some evidence that Rico's release posed a current risk of danger to public safety, and that the superior court order granting the petition for writ of habeas corpus should be reversed.

Alternatively, appellant argues that if Rico is entitled to relief the proper remedy is a remand to the executive branch to provide the process due.

The evidence appellant claims supports the Governor's decision consists of Rico's involvement in a prison gang, which he terminated in 1998, Rico's failure to accept responsibility for the crime, which ended in 2001, and the nature of the crime itself, which was committed in 1990. Because of the passage of time, the evidence relied upon by the Governor is stale as it relates to the issue of current dangerousness. We shall conclude that the evidence appellant claims supports the Governor's decision is not probative to the determination that Rico remains a current danger to the public, and shall affirm the trial court order granting the writ.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Crime

The following brief statement of Rico's crime is quoted from this court's decision affirming Rico's judgment of conviction: "Defendant Alfred Anthony Rico and two friends murdered Tammy Frey because they believed she was spreading rumors accusing one of them of being a police informant. After shooting Frey, the three men drove around for over an hour with Frey propped up in the front seat, stopping to shop and eat.

After an officer noticed the motionless Frey sitting in the car in a motel parking lot, Rico was arrested and charged with murder [citation], and use of a firearm [citation]. The jury was unable to reach a verdict at his first trial, upon retrial a jury found Rico guilty of second degree murder, and the trial court sentenced Rico to 15 years to life with an additional four years for firearm use." Rico's version of events was that he had been sitting behind Frey, who was in the front passenger seat. The driver slipped him a .22 caliber derringer, which he thought was a signal for him to shoot Frey. He and both his co-defendants had been under the influence of methamphetamine for about four days, and all four had used methamphetamine prior to the murder.

B. Rico's Background

Rico was 19 years old when he committed the murder in 1990. He left home when he was 16. He went to church until he was about 16, and he occasionally smoked marijuana before he was 16. After he quit going to church he started using crank and heroin heavily. The men he was with stole to get money, and he got a share of the money from being their driver. The men he hung around were older--in their late 20s and early 30s. He lived with whatever friend would take him in. Prior to the murder Rico had been convicted of two petty thefts.

C. Prison Gang Involvement

After being incarcerated Rico became affiliated with the Northern Structure prison gang. A melee in 1998 involving the northern and southern Hispanic prison gangs prompted his

decision to leave the Northern Structure. Rico considered getting out of the gang one of his biggest accomplishments. A review conducted by the prison in 2000 indicated Rico was validated as an associate of the Northern Structure Prison Gang on November 25, 1998, based upon confidential memoranda dated 1993 and 1994. At that time there was no other current documentation linking him to any Northern Structure gang activity.

D. Prison Misconduct

Rico incurred two CDC 115s.¹ The first was in 1993, the second in 1998. Both were for prison gang melees. Rico's file included five CDC 128(a)s.² The last one was dated 1997, and was for being in an unauthorized area.

E. Positive Prison Conduct

While in prison, Rico obtained his GED, and took college classes from Patton University. He completed vocational coursework in Landscape/Gardening and Office Services in 2007 and 2008, respectively. He was a teacher's aide in Office Services, and obtained exceptional and outstanding ratings.

¹ California Department of Corrections (CDC) Form 115 is a Rules Violation Report form used to document misconduct believed to be a violation of law, or not minor in nature. (Cal.Code Regs., tit. 15, § 3312, subd. (a)(3).)

² CDC Form 128-A is a Custodial Counseling Chrono, used when minor misconduct recurs after verbal counseling, or if documentation of minor misconduct is needed. (Cal.Code Regs., tit. 15, § 3312, subd. (a) (2).)

Rico participated in self-help and therapy programming while in prison. He completed over 26 programs. Among the programs he successfully completed were: "Walking the 12-Steps with Jesus Christ," Narcotics Anonymous, and anger management. He had numerous Narcotics Anonymous program chronos and Violence Prevention certificates in his file. He completed a certificate of appreciation and obtained a commendation from the Youth Adult Awareness Program. He participated in the Victim Offender Recognition Group (VORG), the Youth Diversion Program, and the Walk America March of Dimes. He had a church affiliation while in custody, and obtained numerous certificates of achievement for participation in various religious programs.

Rico received several positive chronos while in prison from a Catholic chaplain, two correctional officers, an independent study instructor, and a positive letter from his Office Services vocational instructor. One of the correctional officer's chronos stated: "I have no qualms with saying that he is one of the few inmates I would consider an asset in today's society. His courteous and respectful behavior towards everyone around him makes it easier for correctional officers to focus our attention on problematic inmates throughout the institution."

As indicated Rico used crank and heroin prior to his incarceration. He has acknowledged the role of drugs in the commission of the offense, and that substance abuse was a major life problem for him. He has been clean and sober since 1993. Drugs have been available to him in prison, but because of what they did to his life, he wants nothing more to do with them.

F. Psychological Evaluation

Rico's most recent psychological evaluation was in 2007. His overall risk of future violence was rated as low. The evaluation concluded that he currently has no serious mental health concerns. On the PCL-R (Psychopathy Checklist-Revised) he scored in the low range of psychopathy, or the 11th percentile relative to the population of incarcerated males. On the HCR-20 (Historical Clinical Risk Management-20) tool predicting future violence, he scored in the moderate range on historical factors, low on the clinical/insight factor, and low on the risk management factor, resulting in an overall propensity for violence in the low range. On the LS/CMI (Level of Service/Case Management Inventory), he scored in the low range for level of future risk for general recidivism.

G. Determination of the Board

The Board found that Rico was suitable for parole and that he would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison.³ In making its determination, the Board expressed several areas of concern, including the nature and gravity of the commitment offense, Rico's prior, though minor, record of criminality, his unstable social history, his past drug and alcohol use, his misconduct in prison, his initial inconsistencies in relating the details of the crime, and his initial refusal to accept responsibility.

³ This was his third parole consideration hearing.

The Board determined that factors in favor of suitability outweighed these negative indications. Specifically, the crime was the result of significant stress because of Rico's youth, drug use, and unsavory peer group. Rico appreciated the magnitude of the crime and was remorseful. He demonstrated insight into the causes of his actions and had gained a deeper understanding of the effect of the crime. He participated in activities indicating an enhanced ability to function within the law upon release, upgraded educationally and vocationally, and excelled at assignments while incarcerated. He had no serious disciplinary problems in the past 10 years. He freed himself from prison gang activity and refrained from drug and alcohol use during incarceration. He participated in self help and therapy programs. He had a church affiliation and extensive participation in religious activities. He had job offers upon his release. He had no assaultive history as a juvenile. He had no significant criminal history. He had a stable social history and relatively stable relationships with family and friends. At the age of 38, he had been incarcerated since the age of 19.

H. Governor's Reversal

The Governor reversed the Board's decision. The Governor gave four reasons for the reversal. First, he cited the nature of the crime, stating that Rico "demonstrated an exceptionally cruel and callous disregard for Tammy Frey's life and suffering The probation officer noted that Mr. Rico's 'actions in this execution style murder, and his actions that followed the

murder, did involve great violence and bodily harm, which reflected a high degree of cruelty, viciousness, and callousness.'"

Next, the Governor stated his concern that Rico's version of events and articulation of responsibility had varied over the years. "According to the appellate record, he initially told an investigating officer that the 'whole thing was a set up.' He admitted that Michael^[4] passed him the gun when he was sitting behind Tammy. . . . Yet, during his second jury trial, Alfred testified that Michael passed Ronald the gun and then Ronald shot her without any planning or forewarning. During his sentencing hearing, he continued to profess his innocence, telling the court, 'But they got the wrong person, your Honor.' [¶] In 1995 Alfred told his mental-health evaluator that he was 'innocent' of the charges and refused to discuss the crime because his conviction was under appeal. But Alfred provided his 2001 mental-health evaluator with a written statement in which he accepted responsibility for his role in the offense. During his 2008 Board suitability hearing, however, Alfred testified that the whole day was 'really confusing' and that he can't say 'whether or not that's the actual of what happened.' He indicated that he 'really believed the 'he' was being asked to do this and 'he' shot.' He thought he was being asked to

⁴ Michael Gonzales and Ronald Hart were Rico's co-defendants.

shoot Tammy because the gun was passed to him and the driver turned the music up."

Third, the Governor stated that an evaluation by Rico's 2008 mental health evaluator provides evidence that Rico still lacks full insight into his responsibility for the murder and that he still poses a risk of recidivism. The evaluator noted that when he asked Rico why he committed the crime, he said, "'There's no reason for what happened.'" The evaluator noted that when considering historical factors that predict future violence, 'the inmate would rate in the moderate range in his propensity for future violence.' Similarly, the most recent risk assessment by Mr. Rico's correctional counselor rated him a 'high degree of threat to the public if release [sic] from prison'"

Fourth, the Governor cited Rico's association with a prison gang, emphasizing that he was not considered for inactive status until 2000.

Rico filed a petition for writ of habeas corpus. Appellant (respondent below) admitted that the Governor's decision contained a factual error in that Rico's 2008 life prisoner evaluation report did not contain a correctional counselor's assessment of Rico's dangerousness rating him a "'high degree of threat to the public if release [sic] from prison'" Nevertheless, appellant asserted that the Governor's decision was supported by some evidence that Rico posed a current risk of danger to society.

I. Superior Court Action

The superior court granted Rico's writ. It found a number of the factors upon which the Governor based his decision to be incorrect. First, Rico's psychological evaluation did not put him in the moderate range for propensity for future violence. Rather, he was in the low range, as he had been in 2001. Second, the statement that the murder was committed "execution style" was contradicted by the record of the Board hearing. Third, the Governor relied on a non-existent correctional counselor's assessment of dangerousness.

As to the Governor's reliance on Rico's gang involvement, the court found that Rico's gang involvement was 10 years old at the time of the parole hearing. Likewise, his failure to accept responsibility for the crime was seven years past. On the other hand, the court stated that the record was "replete with evidence that petitioner has made great strides in seeking therapy and insight into the reasons for his behavior in committing the offense; and in rehabilitating, educating, and bettering himself since then."

The court concluded that the only evidence left to support the Governor's decision were the immutable circumstances of the commitment offense, and since the crime was committed 18 years before the hearing when Rico was very young and under stress, it provided no predictive value regarding his current dangerousness.

DISCUSSION

In order to uphold the Governor's decision, there must be some evidence demonstrating that Rico remains a current threat to public safety. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1191.) Nevertheless, the Governor has the discretion to be more stringent or more cautious than the Board in making the assessment of current dangerousness and in balancing the relevant factors. (*Id.* at p. 1204.) The Governor is authorized to identify and weigh only factors relevant to predicting whether the inmate poses a current threat. (*Id.* at pp. 1205-1206.) The "due consideration" of specified factors that the Governor must give "requires more than rote recitation of the relevant factors with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision--the determination of current dangerousness." (*Id.* at p. 1210.)

I

Appellant argues three factors demonstrate that Rico is unsuitable for parole: (1) Rico's involvement with a prison gang, (2) his lack of insight into the murder, and (3) the aggravated circumstances of the murder. We review the facts supporting each of these.

Appellant points to Rico's involvement with the Northern Structure prison gang, and the fact that he was validated as an associate in 1998. The Governor found it troublesome that Rico had become involved with a gang in prison, when he had been successful in staying away from gangs while growing up.

Appellant argues this fact enhances "the predictive value of his commitment offense because it echoes the circumstances of the murder, wherein Rico committed a violent criminal act based upon his perception that his companions were asking him to do it, and associated with criminally oriented individuals out of a need to 'fit in.'"

However, Rico's last association with a prison gang was in 1998. Rico extricated himself from the prison gang and has had no gang involvement for 10 years. The Board stated it was "impressed" with Rico's ability to stay out of trouble, free himself from his association with prison gangs, and stay away from gang activity while in custody. Any factor relied upon by the Governor establishes unsuitability for parole only if it is probative to a determination of current dangerousness. (*Lawrence, supra*, 44 Cal.4th at p. 1212.) There can be no judicially countenanced inference of current dangerousness from Rico's association with a prison gang that ended 10 years before his parole hearing.

Appellant argues Rico's lack of insight into the murder is evidenced by the fact that he "denied any responsibility for his crime for an extended time, and continued to have difficulty understanding what he did and why." Appellant argues Rico did not admit any responsibility for the murder after his conviction, and maintained his denial until 2001. In fact, Rico initially told police that he was the one who shot Frey after his co-defendant slipped him a gun. After his first trial ended

in a hung jury, he contradicted himself and testified at a second trial that his co-defendant shot the victim.

The Governor's review of Rico's case indicated he told his mental health evaluator he was innocent of the charges in 1995 (three years post-incarceration), but accepted responsibility in a 2001 mental health evaluation. The record on appeal does not contain either of these mental health evaluations. Rico's 2008 parole hearing transcript indicates the 1995 evaluation was completed in May of that year, and that he was still denying responsibility at that time. Rico told the Board that he began accepting responsibility for his actions as a result of the VORG program, in which he participated from 1995 to 1998.

Appellant argues there is some evidence that Rico still has difficulty accepting and understanding his crime. This argument is based on Rico's statement to the Board in 2008 that he could not say what actually happened on the day of the murder, and his statement to the mental health evaluator that there was no reason for what happened.

The first statement came after the Board asked Rico to explain how he came to shoot the victim in the back of the head. He told the Board: "[T]he whole day was really confusing for me because I was on drugs and I was very high and to this day, unfortunately, it's sad because I have to ask myself whether or not what I thought was happening was really happening. And it's sad because I can't really say whether or not that's the actual of what happened. But I have believed at the time when my crime partner passed the weapon back to me, it was my belief that

because of the rat jacket that had been put on my crime partner and the other things that had happened, that he was asking me to do this. And I used the gun, I shot [the victim]"

The second statement was in response to the mental health examiner asking Rico why he committed the crime. He replied: "'At the time, I wasn't aware that it was going to happen. They picked me up and we were going to go get some drugs. There's no reason for what happened. I had been high for ten days on methamphetamine and was starting to hallucinate. I thought my co-defendant wanted me to kill the victim because of the problems he had with her prior.'" Rico told the Board that even though he was influenced by his drug use to commit the crime, he made the decision to pull the trigger, "and I take full responsibility for that."

Rico also told the mental health examiner in 2004 that taking the life of another human being was the most horrible decision of his life. He expressed sorrow for all the pain and suffering he caused so many people, and recognized that he had no right to choose whether the victim lived. In his latest mental health exam, he expressed endless sorrow, and said, "'The victim's little girl had to grow up without her mother. The harm and pain that I caused the victim's family is tremendous and I wish I could change it. Saying sorry is so minimal. I destroyed a lot of lives.'"

The same mental health examiner gave the following evaluation of Rico's exploration of the offense and attempt to understand its causes: "The inmate reports that his chronic use

of drugs was a significant factor leading up to the committed offense. The inmate had been on methamphetamine for ten days prior and was hallucinating. The inmate's judgment was severely and negatively affected by the drugs. The inmate realizes that his loyalty to his friends meant more to him at that time than life itself. The inmate appears to have spent a considerable amount of time attempting to understand and gain insight into the causal factors that resulted in the instant offense. It is unlikely that a requirement for further exploration of the instant offense will produce more significant behavioral changes of a positive or prosocial nature in the inmate."

Taken in context, the statements singled out by the Governor do not demonstrate an inability to accept or understand the crime. Instead, the statement to the Board indicates Rico claimed to have trouble either remembering the details of the crime, or being certain that what he thinks he recalls is what actually happened because he was high on methamphetamine at the time.

Likewise, it is a mischaracterization to claim that his statement to the mental health examiner demonstrates an inability to accept and understand the crime. Instead, his statement that there was no reason for what happened is his attempt to explain that the crime was the result of a senseless act. Rico's statements do not attempt to justify his actions or deny responsibility for them, but merely to explain them to the best of his current ability. Accordingly, the Governor's

conclusion that the statements show difficulty accepting and understanding the crime are not supported by any evidence.

Finally, appellant argues there has been an insufficient passage of time in this case for time to have rendered the circumstances of the crime irrelevant to the question of Rico's current dangerousness. Rico committed the crime 20 years ago, and 18 years before the most recent parole hearing. His sentence was 19 years to life in prison. "[T]he statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1211.) Rico served his base term, and no evidence with a rational nexus to current dangerousness provides a basis for denying parole.

Rico has presented affirmative evidence of a change in his demeanor and mental state through his numerous efforts to improve himself intellectually and emotionally, his acceptance of responsibility for the crime, and his successful abstention from drugs, alcohol, and gang violence. When such affirmative evidence of a prisoner's behavior and current mental state is presented, the nature of the offense no longer realistically constitutes a "reliable or accurate indicator of the prisoner's current dangerousness." (*Lawrence, supra*, 44 Cal.4th at p. 1219.)

We conclude that none of the facts identified by the Governor are probative to the issue of current dangerousness.

II

Appellant argues that the proper remedy when the Governor's parole decision is not supported by some evidence is to vacate the decision and order the Governor to proceed in accordance with due process. Appellant recognizes that a number of courts, including this court, have held that the proper remedy is to vacate the Governor's decision and reinstate the Board's decision, but asserts the argument in order to preserve it for review.

The Supreme Court has tacitly approved the remedy of reinstating the Board's decision when the Governor's reversal is not supported by some evidence of current dangerousness. In *Lawrence, supra*, 44 Cal.4th at page 1190, as here, the Governor reversed the Board's decision to grant parole. The Court of Appeal granted the inmate's habeas corpus petition and reinstated the Board's decision. The Supreme Court affirmed the judgment of the Court of Appeal. (*Id.* at p. 1229.) Thus, the disposition was to reinstate the Board's decision, and not to remand the case to the Governor.

Appellant argues the Supreme Court has indicated that where a parole decision lacks sufficient evidence, the remedy is to order the process due. However, with one exception, the cases cited by appellant are cases that review the Board's decision to deny parole, rather than the Governor's. (*In re Rosenkrantz* (2002) 29 Cal.4th 616 (*Rosenkrantz*); *In re Ramirez* (2001) 94

Cal.App.4th 549, 572, disapproved on another ground in *In re Dannenberg* (2005) 34 Cal.4th 1061; *In re Bowers* (1974) 40 Cal.App.3d 359, 362.)

In *In re Capistran* (2003) 107 Cal.App.4th 1299, 1306-1307, cited by appellant, the court concluded that the proper remedy was to order the Governor to vacate his decision and thereafter to proceed in accordance with due process. The court reasoned that in *Rosenkrantz, supra*, the Supreme Court had ordered the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process, and that because the Governor and the Board possess equal discretion in reviewing parole suitability, the Governor should also be ordered to vacate his decision and proceed in accordance with due process.

Even though the Board and the Governor possess equal discretion in reviewing parole suitability, they fulfill different functions in the parole review process, which affect the remedies available to the court. "Although the Board can give the prisoner a new hearing and consider additional evidence, the Governor's constitutional authority is limited to a review of the materials provided by the Board. (§ 3041.2, subd. (a); *In re Rosenkrantz, supra*, 29 Cal.4th at pp. 659-660; see also Cal. Const., art. V, § 8 subd. (b) [the Governor may only affirm, modify or reverse the Board's decision 'on the basis of the same factors which the parole authority is required to consider'].)" (*In re Smith* (2003) 109 Cal.App.4th 489, 507.) Thus, where there is no "evidence to support a decision other than the one reached by the Board, a remand to

the Governor . . . would amount to an idle act.”⁵ (*Ibid.*)
Remanding the matter to the Governor would be an idle act
because the Governor has already reviewed the materials provided
by the Board and erroneously concluded there was some evidence
to support a reversal of the Board’s decision. (*In re Masoner*
(2009) 179 Cal.App.4th 1531, 1538.) It would “entitle the
Governor to repeatedly ‘reconsider’ the release of the prisoner
no matter how many times the courts found that there was no
evidence that the prisoner was currently dangerous. Such a rule
would violate principles of due process and eviscerate judicial
scrutiny of the Governor’s parole review decisions.” (*Id.* at p.
1540.)

Appellant’s reply brief cites the recent Supreme Court
case, *In re Prather* (2010) 50 Cal.4th 238, 244, in which the

⁵ Penal Code section 3041.2, subdivision (a) provides in
pertinent part: “[T]he Governor, when reviewing the authority’s
decision pursuant to subdivision (b) of Section 8 of Article V
of the Constitution, shall review materials provided by the
parole authority.”

Subdivision (b) of Section 8 of Article V of the Constitution
states: “No decision of the parole authority of this State with
respect to the granting, denial, revocation, or suspension of
parole of a person sentenced to an indeterminate term upon
conviction of murder shall become effective for a period of 30
days, during which the Governor may review the decision subject
to procedures provided by statute. The Governor may only affirm,
modify, or reverse the decision of the parole authority on the
basis of the same factors which the parole authority is required
to consider. The Governor shall report to the Legislature each
parole decision affirmed, modified, or reversed, stating the
pertinent facts and reasons for the action.”

court held that the proper remedy in the event the reviewing court determines the Board abused its discretion is to direct the Board to "conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider." The orders being reviewed by the Supreme Court purported to confine the Board's consideration of evidence on remand to new evidence of the prisoner's conduct since his last parole hearing. (*Id.* at p. 255.) The court reasoned that any order limiting the Board's consideration of all relevant statutory factors would infringe on the authority of the executive branch and violate the doctrine of separation of powers. (*Id.* at p. 253.)

In re Prather, supra, recognized that while both the Board and the Governor must consider the statutory factors concerning parole suitability, the Governor's power amounts to a constitutionally based veto over the Board's decision. (50 Cal.4th at p. 251.) The Board already having issued its decision in this case to grant parole, there is no further record for the Governor to consider, and no decision to be made except to reinstate the decision of the Board.⁶

⁶ Two recently decided cases agree that the proper remedy is to vacate the Governor's decision and reinstate the Board's decision. (*In re McDonald* (2010) 189 Cal.App.4th 1008, 1024; *In re Gomez* (2010) 190 Cal.App.4th 1291, 1310-1311.)

Appellant argues the remedy ordered violates due process because the executive branch has the exclusive authority to determine parole suitability. However, judicial review of the Governor's parole decisions under the same evidence standard does not violate separation of powers. (*Rosenkrantz, supra*, 29 Cal.4th at p. 667.) The power of the courts to provide a meaningful remedy is a necessary component of judicial review. (*In re Masoner, supra*, 179 Cal.App.4th at p. 1539.) The remedy here does not infringe on the Governor's authority to review the Board's decision because he has already reviewed the decision. (*Ibid.*)

DISPOSITION

The judgment is affirmed.

BLEASE, J.

We concur:

RAYE, P. J.

NICHOLSON, J.